No. 89-1366

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

ARDEN BRETT BULLOCK,

Petitioner,

v.

STATE OF UTAH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UTAH SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

In its opinion in State v. Bullock, 119 Utah Adv. Rep. 33, 33-35 (Utah Oct. 18, 1989), the Utah Supreme Court accurately set forth the facts pertinent to the issues raised by petitioner on direct appeal and in his petition for writ of certiorari (see Appendix to Petition at pp. A2-A12). Respondent disagrees with petitioner's statement of the case in the following respects:[1]

1. Petitioner states that Dr. Snow interviewed several other children in

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[1] In many respects, petitioner's statement of the case is a selective recitation of the facts designed to cast them in a light most favorable to petitioner. The Utah Supreme Court's statement of the facts is a balanced and fair summary of the evidence presented. Respondent has sought to identify those specific assertions of fact by petitioner that represent, in respondent's view, clear misstatements of what the record in this case reflects.

the neighborhood and that these interviews resulted in additional charges being filed against petitioner--charges that "were later withdrawn after the children recanted the accusations." Pet. at 11-12. He provides no record citations to support this assertion of fact, and it is not clear to respondent to what charges petitioner is referring. Accordingly, respondent does not concur in this statement of fact.

2. Petitioner states that "Dr. Snow during all of these interviews with the children took no notes and made no recordings either audio or visual of the sessions." Pet. at 12. This suggests that none of Dr. Snow's interviews with any of the children were recorded, which is inaccurate. Dr. Snow videotaped a session with one of the boys for the

Bountiful Police Department and tape recorded a session with another one of the boys and his father. See Vol. for Second Day of Trial at 123-25, 162.

3. Petitioner states that Dr. Tyler "disapproved of the meeting with the children in the County Attorney's Office." Pet. at 16. However, the record citations he gives for this assertion of fact do not support it.

4. Petitioner states that Ryan, one of the child victims, "admitted on another occasion that he told his father that abuse had occurred at a birthday party because his father 'kept bugging him' until he 'finally just lied.'" Pet. at 17. Petitioner also asserts that "Dr. Tyler stated that this type of pressure by Ryan's father would be considered undue pressure in her

estimation." Ibid. These assertions of fact are not supported by the record citations given by petitioner. Although Dr. Tyler recalled Ryan telling her "I made it up because my dad wouldn't believe me," she specifically testified that she did not recall him saying "One time my dad kept 'begging me' so finally I just lied," or saying something about abuse at a birthday party. Vol. for Fourth Day of Trial at 192. Nor did Dr. Tyler render an opinion as to whether the pressure put on Ryan by his father was "undue pressure." Id. at 192-93.

5. Petitioner states that "[a]ll of the experts found Dr. Snow's techniques to be completely unreliable . . . ." Pet. at 25. Although Dr. Tyler, one of the prosecution's expert witnesses, was critical of many of Snow's techniques, it

cannot be fairly stated that she found Snow's techniques to be "completely unreliable."

SUMMARY OF ARGUMENT

Because petitioner's due process claim was not preserved for review, this Court should deny certiorari on that issue. The Utah Supreme Court declined to reach petitioner's due process claim on direct appeal on the basis of procedural bar. Therefore, review is not appropriate. See Michigan v. Tyler, 436 U.S. 499 (1978).

Petitioner did not press below, and the Utah Supreme Court did not pass upon, the issue of whether certain hearsay testimony was admitted at trial in violation of the confrontation clause of the sixth amendment. Accordingly, certiorari should be denied on that issue.

For the same reasons, certiorari should be denied on petitioner's claim that his right of confrontation under the sixth amendment was violated by the videotaping procedures employed in his trial pursuant to Utah state statute.

Finally, petitioner fails to demonstrate that the Utah Supreme Court did not properly apply the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984), in deciding petitioner's ineffective assistance of counsel claim. Nor has he shown that an evidentiary hearing was required, under either this Court's case law or the particular circumstances of this case.

ARGUMENT

Reasons For Denying The Writ

A. Petitioner's Due Process Claim Was Not Preserved For Review.

Petitioner claims that the investigation conducted by a private psychologist and law enforcement authorities prior to his prosecution denied him due process, and that this Court should grant certiorari to review that issue. As stated by the Utah Supreme Court, petitioner

> contends that he was denied due process because the initial interviews of the child victims conducted by Dr. Snow so contaminated the investigative process through suggestive questioning and inadequate recording practices that the evidence of sexual abuse that surfaced during her interviews and the subsequent interviews of the victims by other persons, including their parents, rendered all of the evidence inadmissible.

State v. Bullock, 119 Utah Adv. Rep. 33, 35 (Utah Oct. 18, 1989).

When presented with this claim on direct appeal, the Utah Supreme Court declined to reach the due process issue, ruling that because petitioner had failed to raise the due process objection in the trial court, he was precluded by rule 103(a)(1) of the Utah Rules of Evidence from raising the issue for the first time on appeal. Finding that there was not plain error, the court disposed of petitioner's claim purely on waiver grounds. Bullock, 119 Utah Adv. Rep. at 35.

This Court has made clear that

> [f]ailure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule.

Michigan v. Tyler, 436 U.S. 499, 512 n.7 (1978) (citing Henry v. Mississippi, 379 U.S. 443, 447 (1965); Safeway Stores v. Oklahoma Grocers, 360 U.S. 334, 342 n.7 (1959); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969)). A state procedural ground is adequate so long as the procedural bar has been consistently or regularly applied by the state court. Johnson v. Mississippi, 486 U.S. 578, 587 (1988). Here, petitioner does not claim that Utah's procedural rule serves no legitimate purpose. See Michigan v. Tyler, 436 U.S. at 512 n.7. Nor does he argue that the rule applied in his case has not been consistently or regularly applied. In fact, the Utah Supreme Court has. See, e.g., State v. Eldredge, 773 P.2d 29, 34-35 (Utah) ("Utah Rule of Evidence 103(a) requires 'a clear and

definite objection' at trial to preserve an evidentiary error for appeal."), cert. denied, 110 S.Ct. 62 (1989). See also State v. Van Matre, 777 P.2d 459, 463 (Utah 1989) (refusing to address the defendant's due process claim which was raised for the first time on appeal); State v. Loe, 732 P.2d 115, 117 (Utah 1987) (defendant's constitutional claim, raised for the first time on appeal, would not be reviewed).

Accordingly, the Court should deny certiorari on petitioner's due process claim.

B. Petitioner Did Not Press Below, And The Utah Supreme Court Did Not Pass Upon, The Issue Of Whether Certain Hearsay Testimony Was Admitted At Trial In Violation Of The Confrontation Clause Of The Sixth Amendment; Accordingly, Certiorari Should Be Denied.

Petitioner claims that certain hearsay testimony was admitted at his trial in violation of his right of confrontation protected by the sixth amendment, and he asks this Court to grant certiorari to review that issue.

Petitioner did not raise this issue in the trial court. Nor did he press it as an independent claim of error in the Utah Supreme Court, choosing instead to argue that counsel was ineffective for failing to object to the hearsay on the ground that its admission would violate petitioner's right of confrontation under the sixth amendment.

And, the Utah Supreme Court did not pass upon the confrontation issue outside of the context of petitioner's ineffectiveness claim. See Bullock, 119 Utah Adv. Rep. at 33-36. Under these circumstances, review by this Court is not appropriate. See Heath v. Alabama, 474 U.S. 82, 87 (1985) (there is at least a weighty presumption against review of claim not pressed or passed upon in the state court); Illinois v. Gates, 462 U.S. 213, 218-22 (1983); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).

C. Petitioner Did Not Press Below, And The Utah Supreme Court Did Not Pass Upon, The Issue Of Whether Petitioner's Right Of Confrontation Under The Sixth Amendment Was Violated By The Videotaping Procedures Employed In His Trial; Accordingly, Certiorari Should Be Denied.

Petitioner claims that the videotaping of the child witnesses and the

use of their videotaped testimony in his trial pursuant to Utah statutory law violated his right of confrontation under the sixth amendment, and he requests review of that issue. However, this issue was not pressed or passed upon in the Utah Supreme Court. Therefore, for the same reasons certiorari should not be granted to review petitioner's confrontation claim related to the admission of certain hearsay testimony at his trial, it should not be granted to review this additional sixth amendment claim. See Heath, 474 U.S. at 87; Gates, 462 U.S. at 218-22; Cardinale, 394 U.S. at 438.

D. The Utah Supreme Court Properly Applied The Standards For Determining The Question Of Ineffective Assistance Of Counsel Set Forth In Strickland v. Washington, 466 U.S. 668 (1984); Furthermore, Nothing In Either Strickland Or Other Decisions Of This Court Required That There Be An Evidentiary Hearing Before The Utah Supreme Court Could Decide The Ineffectiveness Question.

Petitioner argues that the Utah Supreme Court improperly applied the standards for determining the question of ineffective assistance of counsel set forth in Strickland v. Washington, 466 U.S. 668 (1984), and that an evidentiary hearing was required before that court could decide the ineffectiveness issue presented in his case. He requests review of both issues.

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell

below an objective standard of reasonableness." Strickland, 466 U.S. at 687-88 (emphasis added). Strickland also made clear that:

> [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound

> trial strategy." See Michel v. Louisiana, supra, at 101. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L. Rev. 299, 343 (1983).

466 U.S. at 689-90.

The Utah Supreme Court properly applied the foregoing principles in concluding that the performance of petitioner's trial counsel was not deficient, and that counsel's representation reflected a legitimate exercise of professional judgment in the choice of trial strategy. Bullock, 119 Utah Adv. Rep. at 36; see also id. at 37 (Zimmerman, J. concurring). The court stated:

> It is reasonable to conclude that defense counsel, an experienced criminal lawyer, consciously chose not to seek

the exclusion of the testimony about which defendant now complains. While the evidence complained of may have been inadmissible, trial counsel could reasonably conclude under these circumstances that there was little chance of keeping the testimony of the children out of evidence, especially after the trial court sua sponte made reliability findings. He might well have thought that the only way of effectively undermining the mutually consistent testimony of these young children about shocking incidents of sexual abuse was not to insist that the children testify at trial or object to their videotaped testimony, but rather was to put a less sympathetic adult witness, such as Dr. Snow, on the stand and to portray her as an unprofessional, misguided zealot who put these ideas in the children's minds through the use of techniques akin to brainwashing. In this way, counsel could explain to the jury why the children were relating untrue stories which they seemed to believe. Having made this decision, counsel could reasonably have concluded that it would be inconsistent to seek to exclude Dr. Tyler's testimony about behavior and the children's out-of-court statements and that since the

> experts, not the children, were thus "on trial," there was little reason to try to keep out their opinions on abuse.

These conclusions, which are relevant to the questions of deficient performance and justifiable trial strategy, were the result of an analytical approach consistent with that set forth in Strickland. As noted by Justice Zimmerman in his concurring opinion:

> Trial counsel consciously chose a strategy that differs from that which appellate counsel thinks might have succeeded below and which Justice Stewart states would have resulted in the exclusion of virtually all of the State's evidence. However, there is certainly no assurance that the trial court, or a majority of this Court, would accept the proposition advanced by appellate counsel and by Justice Stewart that the children were so tainted by Barbara Snow's activities that they could never take the stand. Absent the acceptance of that proposition, one cannot say that trial counsel's trial strategy was wrong, much less that it was incompetent. If trial counsel had

> chosen a different strategy and had succeeded in excluding the testimony of Barbara Snow and the videotapes of the children, he would still have faced the live testimony of several of the children. It is difficult to conclude that, tactically speaking, having the children testify live in the absence of Snow would have been better for the defense than having the children appear by videotape and focusing the whole trial on Snow and the manner in which the State's case was prepared.

119 Utah Adv. Rep. at 37.

Furthermore, contrary to petitioner's suggestion, there is nothing in Strickland, Darden v. Wainwright, 477 U.S. 168 (1986), or Kimmelman v. Morrison, 477 U.S. 365 (1986), that required the Utah Supreme Court to remand the case for an evidentiary hearing to have trial counsel testify as to their trial strategy. The court had before it a record from which it could reasonably determine counsel's trial strategy and

fairly consider whether that "'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). This approach is consistent with this Court's conclusion in Strickland that "[t]he state courts properly concluded that the ineffectiveness claim was meritless without holding an evidentiary hearing." 466 U.S. at 700.

In short, this case presents nothing unique in terms of the Strickland standard. Accordingly, the Court should deny certiorari on petitioner's ineffectiveness claim.

CONCLUSION

Based upon the foregoing arguments, the petition for writ of certiorari should be denied.

RESPECTFULLY submitted this 27 day of March, 1990.

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